

Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.
ATTORNEYS AT LAW

CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007-4492
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

RICHARD BAR
STEVEN JOHN FELLMAN □
EDWARD D. GREENBERG
WILLIAM F. KREBS □
DAVID K. MONROE □
REX E. REESE
TROY A. ROLF □
STUART M. SCHABES
DAVID P. STREET □
KEITH G. SWIRSKY □

KEVIN I. BABITZ □
KATHARINE V. FOSTER □

ROBERT N. KHARASCH ○
JOHN CRAIG WELLER □ ○

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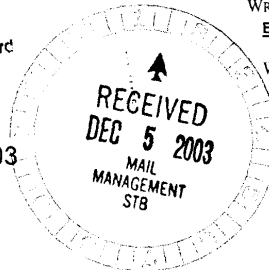
GEORGE F. GALLAND (1910-1985)

WRITER'S DIRECT E-MAIL ADDRESS
EGREENBERG@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER
202-342-5277

* NOT ADMITTED IN DC □ NOT ADMITTED IN MD ○ OF COUNSEL

December 5, 2003



Via Hand Delivery

The Honorable Vernon A. Williams, Secretary
Office the Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, D.C. 20423-0001

**Re: FD 34392; New Jersey Rail Carrier, LLC - - Acquisition and Operation
Exemption - - Former Columbia Terminals, Kearny, NJ**

Dear Secretary Williams:

Enclosed for filing with the Board is the Reply of New Jersey Department of Environmental Protection ("NJDEP") to the Statement filed by New Jersey Rail Carrier LLC ("NJRC").

I have enclosed ten (10) copies to permit your circulation of the document. In addition, an additional copy is enclosed for providing a date-stamped copy to be returned to us. As reflected below, a copy of this letter is being transmitted by facsimile to each of the parties of record in this proceeding.

If you have any question concerning this, please do not hesitate to contact me.

Very truly yours,

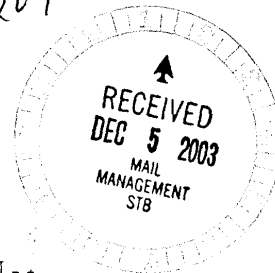

Edward D. Greenberg

EDG
Encl

cc: Fritz R. Kahn, Esq. (by facsimile)
Steven J. Madonna, Esq. (via facsimile)
Jonathan M. Broader, Esq. (by facsimile)
John V. Edwards, Esq. (by facsimile)

209548

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



FINANCE DOCKET NO. 34392
- - ACQUISITION AND OPERATION EXEMPTION - -
FORMER COLUMBIA TERMINALS, KEARNY, NJ

5

REPLY OF
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Pursuant to the order served in this proceeding on August 13, 2003¹, the New Jersey Department of Environmental Protection ("NJDEP") submits its reply to the Statement filed by New Jersey Rail Carrier LLC ("NJRC") on October 14, 2003.

DISCUSSION

On August 7, 2003, NJRC filed a Verified Notice of Exemption, pursuant to the procedures of 49 C.F.R. §1150.31. As NJDEP believes that the information contained in its Notice was insufficient, on August 12, 2003, NJDEP filed a petition to stay the effective date of the exemption. NJDEP requested the Board to instruct NJRC to provide information that would permit NJDEP, the Board and other parties to ascertain whether NJRC's operations would be a bona fide "rail carrier", as that term is defined in 49 U.S.C. §10102(5), or whether it was in reality a shipper in the solid waste disposal industry whose primary intent was to utilize the preemption provision of 49 U.S.C. §10501(b) to evade the State of New Jersey environmental safety and health statutes regulations.

On October 14, 2003, NJRC filed a detailed Statement containing supplemental information addressing the scope of its proposed operations. After setting forth the nature of its proposed activities, NJRC made a number of representations that were designed to assure both NJDEP and

¹ Under the terms of the August 13, 2003 decision, NJRC was given the opportunity to submit additional information to the Board on September 12, 2003, with other parties responding within 20 days thereafter. These procedural dates were extended by Decisions served September 11, October 23, and December 2, 2003, so that the deadline for filing for a reply has been extended to December 5, 2003.

the Board that it was not intending to be a "sham" rail carrier; that it did not intend to conduct activities as a solid waste transfer station; that it would not engage in any form of solid waste tipping, processing, sorting, compacting or removing of solid waste from containers; that it would comply with all District Plan Solid Waste Flow Control provisions; that it would operate in full compliance with all relevant NJDEP regulations; and that it would waive any exemption from the preemption provision of 49 U.S.C. §10501(b) by which it might otherwise seek to avoid NJDEP's solid waste transfer station rules. (*See* NJRC Statement at 5-8.)

Subsequently, representatives of NJRC met with NJDEP officials on several occasions, resulting in the negotiation of a settlement agreement in which NJRC memorialized the representations and commitments it made to NJDEP. (We have attached a copy of the terms of that Settlement Agreement as Exhibit 1 to this Reply.) In view of the additional information provided by NJRC and in reliance upon the representations and commitments set forth in NJRC's Statement and the provisions of the Settlement Agreement, NJDEP is satisfied that NJRC's proposed activities are not intended to evade NJDEP's environmental statutes and regulations and that NJRC is intending to operate as a legitimate rail carrier. Consequently, NJDEP does not oppose or challenge NJRC's Notice.²

Accordingly, NJDEP supports removal of the stay order, so that the exemption can be made effective immediately.

² NJDEP reserves the right, however, to move to revoke the exemption in the event NJRC violates the representations and commitments set forth in the Settlement Agreement.

Respectfully submitted,


By: Edward D. Greenberg

GALLAND, KHARASCH, GREENBERG,
FELLMAN & SWIRSKY, P.C.
1054 Thirty First St., N.W.
Washington, DC 20007-4492
Telephone: 202-342-5277
Facsimile: 202-342-2311

Special Counsel for the State of New Jersey,
Department of Environmental Protection

Dated: December 5, 2003

EXHIBIT 1

SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT (this "Agreement") is entered into this ____ day of December, 2003 by the State of New Jersey, Department of Environmental Protection ("NJDEP") and New Jersey Rail Carrier LLC ("NJRC"), a limited liability company located at 65 Central Ave., South Kearny, NJ 07032.

WITNESSETH:

WHEREAS, on or about August 7, 2003, NJRC filed a Verified Notice of Exemption ("Notice"), pursuant to 49 U.S.C. 10502 and 49 C.F.R. 1150.31, *et seq.*, with the Surface Transportation Board ("STB") in STB Finance Docket No. 34392, *New Jersey Rail Carrier LLC - - Acquisition and Operation Exemption - - Former Columbia Terminals, Kearny, NJ*, by which it sought recognition by the STB as a "rail carrier", as that term is defined in 49 U.S.C. §10102(5);

WHEREAS, on or about August 12, 2003, NJDEP intervened in STB Finance Docket No. 34392 and requested that the STB stay the effectiveness of the Notice in order to give NJRC an opportunity to provide further information relevant to its proposed operations;

WHEREAS, on or about August 13, 2003, the STB served a decision staying the effective date of the Notice and directed NJRC to file additional information concerning whether it had properly invoked the STB's exemption procedures for this transaction and authorized other parties, including NJDEP, to respond to any additional information that NJRC might submit in STB Finance Docket No. 34392;

WHEREAS, on or about October 14, 2003, NJRC filed a Verified Statement providing a description of its proposed operations, which statement contained a number of representations pertaining to NJRC's commitment not to operate a solid waste transfer station, as the term is defined in N.J.A.C. 7:26-1.1 *et seq.*, and to comply with all applicable NJDEP regulations;

WHEREAS, NJRC has met with NJDEP representatives on several occasions subsequent to its October 14, 2003 filing with the STB in order to further clarify the scope and purpose of its operations; and

WHEREAS, NJDEP has determined not to oppose NJRC's efforts to become recognized as a "rail carrier" in STB Finance Docket No. 34392 based upon the representations and commitments by NJRC in the October 14, 2003 Statement, the meetings held with representatives of NJDEP and the provisions of this Agreement;

NOW THEREFORE, in consideration of the premises set forth above, the mutual promises and covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are mutually acknowledged, the parties, desiring to be legally bound, agree as follows:

1. **Incorporation of Recitals.** Each of the premises and recitals set forth above is incorporated by reference as if fully set forth herein.
2. NJRC waives any exemption from the New Jersey solid waste transfer station rules and regulations that may otherwise be applicable to rail carriers and will not contend that the regulations embodied in N.J.A.C. 7-26-1.1 are preempted by 49 U.S.C. § 10501(b) with respect to their application to NJRC's operations at the site located at the former Columbia Terminals in South Kearney, New Jersey.
3. NJRC will apply for and obtain a permit prior to operating a solid waste transfer station, whether or not such permits are required of rail carriers.
4. NJRC will comply with all NJDEP regulations, including but not limited to the provisions applicable to non-rail carrier entities as provided in N.J.A.C. 7:26-1.1 *et seq.*,
5. NJRC agrees that neither it, New Jersey Transloading Company LLC ("NJTC") nor any other party operating at its facility will engage in any form of solid waste tipping, processing, sorting, compacting or removing of solid waste from one container or vehicle to another container or vehicle.
6. NJRC agrees that all waste will be handled exclusively in sealed, watertight containers and that the covers will be waterproof and that these containers will not be opened or allowed to leak.
7. NJRC will comply with all New Jersey District Plan Solid Waste Flow Control Provisions and will accept waste only from transfer stations that have been appropriately licensed in accordance with those regulations.
8. NJRC agrees that non-putrescible waste will not be held for periods in excess of 10 days, and that putrescible waste will not be held in excess of 72 hours.
9. NJRC agrees that all machinery and equipment at its facility will be in compliance with NJDEP's requirements and that it will comply with all NJDEP, Federal Railroad

Administration and Environmental Protection Agency regulations pertaining to noise emissions and air pollution.

10. NJRC will submit all disclosure statements required pursuant to N.J.S.A. 13:1E-126 *et seq.*, within thirty (30) days of the date of this agreement and agrees that it shall cease and desist operations if it or any of its key employees are found not to comply with the requirements of the foregoing statute and regulations promulgated thereunder, subject to its rights under the Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, to contest any such cease and desist order.
11. Upon execution of this Agreement, NJDEP will advise the STB that it and NJRC have entered into this Agreement and that NJDEP, in reliance on the commitments made herein by NJRC, will not oppose or challenge NJRC's Notice to become a rail carrier pursuant to the provisions of 49 C.F.R. 1150.31 *et seq.*
12. **Benefit of Counsel.** The parties hereto acknowledge, represent and agree that each has received the benefit of the advise of counsel concerning this Agreement, that this Agreement has been negotiated and approved by the parties through their respective attorneys, and that, notwithstanding any rule or maxim of construction to the contrary, neither this Agreement nor any provision thereof shall be construed against any party hereto based upon the authorship of any provision of this Agreement.
13. **Miscellaneous.**
 - (a) **Waiver of Breach.** The waiver of a breach of any provision of this Agreement by a party shall not operate or be construed as a waiver of any subsequent breach by the breaching party. Failure to insist on strict compliance with any provision hereof shall not be deemed a waiver of such provision or any other provision hereof.
 - (b) **Notices.** Any notice required or permitted to be given under this Agreement shall be sufficient if in writing, and sent by certified mail, hand delivery or overnight courier to the party's address first written above, and shall be deemed delivered upon mailing or delivery to such courier.
 - (c) **Severability.** If any provision of this Agreement is contrary to any federal or State statute, ordinance or regulation or common law, the parties declare that such provision shall be amended to conform to any such statutory or regulatory provision, as the case may be. The invalidity or unenforceability of any provision hereof shall not affect the validity or enforceability of any other provision and the remaining provisions shall remain in full force

and effect as if the Agreement had been executed with the invalid or unenforceable provisions eliminated.

(d) Entire Agreement. This Agreement contains the entire integrated agreement of the parties, and may not be changed orally but only by an agreement in writing signed by both parties.

(e) Applicable Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey, excluding New Jersey conflict of laws principles, and the venue for any legal action arising out of this Agreement shall be in the State of New Jersey.

(f) Counterparts. This Agreement may be entered into in two or more counterparts, each of which shall constitute an original agreement, and all of which together shall constitute one and the same agreement.

(g) Third Party Rights. Nothing in this Agreement shall be construed to create any rights in any persons or entities other than the parties hereto as third party beneficiaries.

(i) No Arbitration. The parties expressly agree that the construction and enforcement of this Agreement shall not be the subject of arbitration, and no arbitrator shall have any jurisdiction whatsoever to construe or enforce this Agreement or any term or provision hereof. The parties voluntarily and knowingly waive any claim or right to mediation, or any other form of alternative dispute resolution.

(j) Jury Trial Waiver. THE PARTIES HERETO EACH WAIVE ALL RIGHTS TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING INSTITUTED BY OR AGAINST ANY PARTY HERETO THAT RELATES TO OR IS CONNECTED WITH THIS AGREEMENT.

[Signatures on the following page]

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first written above.

ATTEST:

New Jersey Department of
Environmental Protection

Name: _____

By: _____
Name: _____
Title: _____

ATTEST:

New Jersey Rail Carrier, LLC

Name: _____

By: _____
Name: _____
Title: _____

Certificate of Service

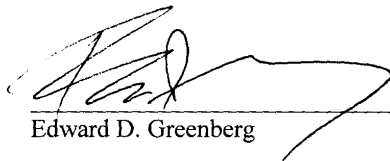
I hereby certify that a copy of the foregoing State of New Jersey, Department of Environmental Protection Reply was served this 5th day of December 2003 via Facsimile to the following:

Fritz R. Kahn, Esq. (via facsimile)
Fritz R. Kahn, P.C.
1920 N Street NW, 8th Floor
Washington DC 20036-1601
202-263-4152
202-331-8330 Fax

Steven J. Madonna, Esq. (via facsimile)
17 Wachtung Ave
Chatham, NJ 07928
973-701-9300
973-701-9630 Fax

Jonathan M. Broder, Esq. (via facsimile)
Vice President & General Counsel
Consolidated Rail Corporation
2001 Market Street, 16th Floor
Philadelphia, PA 19103
215-209-5020
215-209-4819 Fax

John V. Edwards, Esq. (via facsimile)
Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk VA 23510-9241
757-629-2838
757-533-4872 Fax



Edward D. Greenberg